

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN WESLEY GRAY)	
)	
Petitioner)	
)	
v.)	Civil No. 01-102-B-S
)	
STEVEN ROWE)	
)	
Respondent)	

***RECOMMENDED DECISION ON
PETITION FOR WRIT OF HABEAS CORPUS***

Petitioner, John Gray, has filed a 28 U.S.C. § 2254 petition for habeas corpus relief from his state court conviction and sentence. (Docket No. 1.) The Attorney General for the State of Maine was ordered to answer. (Docket No. 2.) The Attorney General has responded with a motion to dismiss. (Docket No. 4.) After due consideration to Gray's and the State's arguments I recommend that the Court deny Gray habeas relief.

Factual Background¹

Gray pleaded guilty on November 1, 1999, to a charge of vehicular manslaughter. On December 1, 1999, he was sentenced to twelve years of imprisonment with all but six of those years suspended. During this hearing the court attributed to Gray a trio of operating after suspension convictions that were in truth convictions of the manslaughter victim. This was a misstep that went unchecked by the parties during the hearing.

¹ Portions of this factual recital are taken from a decision I entered on a prior 28 U.S.C. § 2254 filed by Gray. (CV-19-B-S, Docket No. 5.)

Gray filed an application to allow an appeal of his sentence on December 9, 1999. The Sentence Review Panel for the Supreme Judicial Court denied Gray leave to appeal the sentence on February 24, 2000. Gray did not file a direct appeal of his conviction.

However, on February 29, 2000, Gray did file a motion pursuant to Maine Rules of Criminal Procedure 35 seeking to reopen his sentencing because of the mix-up over Gray's and the victim's driving records. The superior court issued an order denying this motion, that was entered on April 7, 2000. It stated that the absence of the three operating under suspension convictions "would not alter the sentence imposed by the court given the significant facts of the tragic accident caused by the defendant tested at .24 BAC after the accident. Additionally, the medical records revealed a long history of substance abuse, coupled with a significant criminal history in the mid-1970s." (Order Apr. 7, 2000.)

On April 28, 2000, Gray filed a notice of appeal of this order to the Maine Supreme Judicial Court sitting as the Law Court. In his memorandum supporting this appeal Gray, through counsel, restated his challenge to his sentence, citing the mistake of fact, and seeking a resentencing so that Gray could "be accorded the full due process of law to which he is entitled." (Def's Mem. May 22, 2000.) The Law Court denied Gray a certificate of probable cause to proceed with the appeal on June 7, 2000.

Gray first attempted to file a petition for a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254 on January 29, 2001. (Civil No. 01-19-B-S.) After filing this initial habeas petition in this court and after the State filed its motion to dismiss, Gray filed a motion for post-conviction review pursuant to Maine Rule of Criminal Procedure 66 and 15 M.R.S.A. § 2121 et seq. In his state post-conviction

petition Gray raised the same two grounds for relief as claimed in his January 29, 2001, 28 U.S.C. § 2254 petition: one, that the sentencing court made a material mistake of fact when it attributed the victim's driving record to Gray and, two, that his attorney was ineffective because he failed to recognize and challenge this mistaken attribution or make it clear in the original Rule 35 motion that this was a claim of constitutional magnitude. According to Gray he filed this motion on March 27, 2001, believing it to be timely because of the State's representation in its motion to dismiss the 28 U.S.C. § 2254 petition that Gray had until March 30, 2001, to file this motion with the court (and thus had not exhausted his still exhaustible claim). The superior court entered a summary dismissal order concluding that Gray's motion was time-barred because it was filed after the running of the one-year limitation period contained in 15 M.R.S.A. § 2128(5). The court described the one-year period as running from December 21, 1999, the date that Gray's time for taking a direct appeal of his conviction elapsed. The superior court's order was entered on April 4, 2001.

I entered an order on April 26, 2001, recommending the dismissal of Gray's first habeas filing because of his failure to exhaust all his remedies pursuant to 28 U.S.C. § 2254(b)(1)(A). At this juncture I made no determination as to whether this failure to exhaust was an infirmity that affected both grounds raised in the federal habeas petition though it clearly implicated Gray's ineffective assistance of counsel claim. See discussion *infra*. In that order I noted:

Gray's motion for post-conviction review was denied as untimely by the superior court on April 4, 2001. Under Rule 76 of the Maine Rules of Criminal Procedure, Gray has twenty days from the entry of that judgment on the docket to appeal this determination to the Law Court. Me. R. Crim. P. 76(c). That rule also provides that "upon a showing of excusable neglect, the assigned justice may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal not exceeding 30 days from the expiration of the original time

herein prescribed.” Id. Therefore, to the extent that Gray’s post-conviction challenge relates to his § 2254 claims he has not yet exhausted them.

At the time that I was considering Gray’s first petition the State took the position that the filing of Gray’s Rule 35 motion on March 30, 2000, tolled the running of the 15 M.R.S.A. § 2128(5) limitation period during the pendency of that action. It perceived that Gray had until March 30, 2001, to file his motion, though it did qualify this representation with the clause, “[a]ssuming the State’s calculations are correct.” The State argued that a dismissal of Gray’s ineffective assistance of counsel claim was appropriate: “Since Petitioner may yet raise this claim in a state post-conviction proceeding, 28 U.S.C. § 2254(b)(1)(A) and (c), as well as principles of federalism and comity, necessitate dismissal of this claim.”² No objection having been filed with respect to this disposition, the District Court affirmed my recommended decision.

Gray returned to the Maine courts. On May 15, 2001, Gray filed a motion to enlarge the time in which to file a notice of appeal from the summary dismissal of his post-conviction review petition.

Gray did not file a separate document that was an actual notice of appeal with this motion to enlarge.

The Maine Superior Court entered an order that stated:

Pending before the court is a photocopy of the petitioner’s motion to enlarge time to file motions. The motion does not contain a suggestion that the petitioner sent a copy to the District Attorney. In substance, the petitioner seeks an enlargement of the time to file an appeal from the order that summarily dismissed the petition for post-conviction review. Pursuant to 15 M.R.S.A. § 2131(1), a notice of appeal operates as a request for a certificate of probable cause, on which the Law Court would determine whether it would permit a plenary appeal from the order of dismissal.

The order of summary dismissal was entered on April 6, 2001. A notice of appeal from that order needed to be filed by April 26, 2001. See M.R. App. P. 2(b)(1). If the petitioner were able to show that the notice of appeal had not been filed in a timely way because of

² The State argued that the first claim had been procedurally defaulted and should be denied out of hand. I discuss the karma of this claim below.

excusable neglect, then the court could permit the petitioner an additional 21 days – that is, to May 17, 2001 – to file the notice of appeal. See M.R. App. P. 2(b)(5).

The petitioner filed his motion to enlarge on May 15, 2001. However, he failed to file a notice of appeal itself, which would be deemed valid and timely if the underlying motion to enlarge were granted. Thus, even if the court granted the petitioner's motion to enlarge, he would not be able to file a notice of appeal by the latest date available under the rules, namely, May 17. Even if a photocopy is permissible, the court is unable to stretch the motion to enlarge into an instrument that would serve as a notice of appeal. See e.g., M. R. Crim. P. 76(b). Thus, the motion to enlarge must be denied because, even if it were granted, the petitioner would not be entitled to the relief he seeks. The court need not and therefore does not reach the issue of whether excusable neglect justified the petitioner in not filing a notice of appeal within the or[i]ginally prescribed time period.

(Super. Ct. Order May 22, 2001.) After this second rebuff by the Maine courts, Gray reinitiated his efforts to get federal habeas relief with the filing of this petition on May 30, 2001.

Discussion

I address Gray's petition in several steps. First, I address the State's argument that Gray's entire petition is barred on statute of limitation grounds. Second, I address the two claims in Gray's federal habeas that were included in Gray's petition for state post-conviction relief. At this stage, I must separate out these two claims, Gray's ineffective assistance of counsel claim because of his attorney's failure to recognize and challenge the material mistake of fact at the sentencing and his material mistake of fact/denial of due process claim. I conclude that Gray is prohibited from pressing this ineffective assistance of counsel claim in his federal habeas because the state denied him relief on this ground on the basis of his procedural default, which is an adequate and independent state law ground for denying post-conviction relief. With respect to his material mistake of fact/ due process claim I conclude that Gray adequately presented this claim to the state court, thereby exhausting it, but, on the merits, he is not entitled to federal habeas relief on this ground. Third, and finally, I address Gray's third ground,

entitled “Denial of Right to Appeal” and two fragmentary ineffective assistance claims, all of which Gray never presented to the state courts. While these are not “exhausted” in the sense contemplated by 28 U.S.C. § 2254 (b)(1)(A), I recommend denying them despite the want of exhaustion because they are all transparently without merit.

A. Application of the 28 U.S.C. § 2254 Statute of Limitation

The statute of limitations for 28 U.S.C. § 2254 purposes is found in 28 U.S.C. § 2244(d)(1). It provides the federal habeas petitioner has one year to file a 28 U.S.C. § 2254 motion, a year that begins on "the date on which the [state's] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1).

The time during which Gray’s first 28 U.S.C. § 2254 petition was pending in this court does not toll subsection (d)(1) year’s running. Last term the United States Supreme Court interpreted 28 U.S.C. §2244(d)(1). See Duncan v. Walker, ___ U.S. ___, 121 S.Ct. 2120 (2001). The Duncan Court majority concluded that the tolling provision of 28 U.S.C. § 2244(d)(2) calling for the tolling of the 28 U.S.C. § 2244(d)(1) period while the petitioner pursued “[s]tate post-conviction or other collateral review” was not meant by Congress to require tolling while a federal habeas petition was pending. 121 S.Ct. at 2129. That is, the clause “other collateral review” means other state collateral review not other state or federal collateral review. Id. at 2124-29. Accord Delaney v. Matesanz, ___ F.3d ___, 2001 WL 1001086, * 4 (1st Cir. Sept. 5, 2001); Neversson v. Bissonnette, 261 F.3d 120, 125 (1st Cir. 2001).

1. Revisiting Gray’s First 28 U.S.C. § 2254 Petition

If this court’s responsibility began and ended with the need to count the days on a calendar between the date Gray’s conviction and sentence became final and the filing date of his second petition -

- subtracting the time his state collateral review and other post-conviction relief was pending as anticipated by 28 U.S.C. § 2244(d)(2)-- then it would seem, as the State argues, that Gray's second petition is time-barred. However, I now conclude, based on intervening Supreme Court and First Circuit precedent, that I should have used greater care when dismissing Gray's initial January 29, 2001, habeas petition.

Rather than dismissing the petition in toto this court should have parsed the petition to determine whether both Gray's claims were unexhausted or not. In fact, Gray had satisfactorily exhausted his claim that the sentencing court made a material mistake of fact by pressing this ground in his attempt to appeal to the Maine Law Court the superior court's denial of his motion to correct or reduce his sentence.³ Therefore, Gray's first petition was a "mixed petition" containing one exhausted claim and his unexhausted ineffective assistance of counsel claim. Haste, in this case an approach taken in the hopes of giving Gray the opportunity to meet the state's time-limit, can make waste and it was improvident of me to fail to distinguish between Gray's two claims for exhaustion purposes.

I address the consequences of this earlier dismissal for Gray's second effort to bring his petition before this court with the assistance of some newly minted guidance. The concurring Supreme Court

³ In that decision recommending the dismissal of the first petition I briefly addressed the State's argument that Gray had procedurally defaulted his material mistake of fact/due process claim. I observed:
The Attorney General asserts that Gray's first claim has been procedurally defaulted since he did not and cannot now raise the federal constitutional issue in the state courts. In the memorandum supporting the Rule 35 motion, Gray does twice state that he seeks resentencing to assure that his "due process" rights are protected. Whether or not this adequately presented the federal question to the state courts is not black-and-white. See Martens v. Shannon, 836 F.2d 715, 717 (1st Cir. 1988) ("The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory might be lurking in the woodwork will not turn the trick.") This is a bridge that we cannot cross today, but it is also a bridge that is not burned by dismissing this petition by Gray for failure to exhaust his state court remedies.

Unfortunately I may have dropped a match that left the bridge smoldering. For the reason discussed herein, I conclude that Gray's argument before the Maine courts that the material mistake of fact implicated his right to due

Justices Stevens and Souter in Duncan and the First Circuit in Neverson and Delaney have given strong clues on how to best treat 28 U.S.C. § 2254 petitions that harbor both exhausted and unexhausted claims. In Duncan Justice Stevens wrote a concurrence, joined by Justice Souter, reflecting:

First, although the Court's pre-AEDPA decision in Rose v. Lundy, 455 U.S. 509, 522 (1982), prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but nonmeritorious claims, see 28 U.S.C. § 2254(b)(2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period.

121 S.Ct. at 2130. In a separate one-paragraph concurrence Justice Souter buffered this point:

“Although I join the Court's opinion in full, I have joined Justice STEVENS's separate opinion pointing out that nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies[.]” Id. at 2129. Referencing these concurrences the First Circuit has suggested that the practice of staying exhausted claims while unexhausted claims are exhausted might be the best way to triage mixed petitions. In Neverson it cautioned in a footnote:

To be sure, the petitioner could have improved his position by requesting that the district court stay, rather than dismiss, Petition No. 1. See Duncan, 531 U.S. at ----, 121 S.Ct. at 2130 (Stevens, J., concurring) (observing that "there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies"); see also Zarvela v. Artuz, 254 F.3d 374, 380 (2d Cir.2001); Freeman v. Page, 208 F.3d 572, 577 (7th Cir.2000); Calderon v. United States Dist. Ct., 134 F.3d 981, 986-87 (9th Cir.1998). Post-AEDPA, this will be the preferable course in many cases involving "mixed" petitions--and it may be the only appropriate course in cases in which an outright dismissal threatens to imperil the timeliness of a collateral attack.

process under the law sufficiently raised the constitutional issue so as to be cognizable as a 28 U.S.C. § 2254(a) claim.

261 F.3d at 126 n.3. Subsequently, in Delaney, the First Circuit reiterated, almost verbatim, these words of advice to 28 U.S.C. § 2254 petitioners with mixed petitions. 2001 WL 1001086, at *8 n.5 (citing Neverson). However, Delaney added a caution to the lower federal courts: “We especially commend such an approach to the district courts in instances in which the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely.” Id.

By dismissing outright Gray’s first petition, I did unwittingly “imperil the timeliness” of his federal collateral attack. Since I conclude that a reviewing court would have the authority to undo my dismissal of Gray’s first proffer and remake it, nunc pro tunc, into a stay pending exhaustion, see Zarvela v. Artuz, 254 F.3d 374, 382-83 (2d Cir. 2001), this is the disposition I now recommend.⁴ I therefore proceed to consideration of the State’s second argument for dismissal of Gray’s petition.

B. The Claims Gray Included in his State Post-conviction Review Petition

In his erstwhile petition for state post-conviction review of his conviction Gray asserted two grounds for relief. First, he claimed that the sentencing judge made a material mistake of fact by confusing his driving record with the driving record of the victim. Second, he asserted that he had ineffective assistance of counsel in that his attorney never brought to his attention that the District Attorney was using the victim’s driving record against him to argue for a lengthier sentence.⁵

⁴ I recognize that this treatment of Gray’s petition skirts with the question of whether or not the 28 U.S.C. § 2244(d)(1) statute of limitation can be equitably tolled. If this disposition were seen as a form of equitable tolling then my analysis would need to follow a different and more labored course. Reading the inflections in Delaney and Duncan on equitable tolling and the remand directive of Neverson this court would need to inquire whether Gray has made a showing that would entitle him to equitable tolling, and, if so, whether 28 U.S.C. § 2244(d)(1) is subject to it.

⁵ Appended to this ground in Gray’s state post-conviction petition was a contention that his attorney was further ineffective in not asserting in Gray’s Rule 35 motion that the mistake of fact violated his federal constitutional right under the Fourteenth Amendment. Gray does not press this assertion in his 28 U.S.C. § 2254 and I need not

Gray's first ground in the initial and the instant 28 U.S.C. § 2254 petition iterates his first ground presented in his petition for state post-conviction review. He also reiterates to this court his second ground in his state post conviction review, an ineffective assistance of counsel claim.⁶

1. Ineffective Assistance of Counsel Claim is Unreviewable in a Federal Habeas Because of Denial On Independent and Adequate State Law Grounds

I conclude that Gray's principal ineffective assistance of counsel claim in this 28 U.S.C. § 2254 petition cannot be reviewed by this court because it has been proffered to the state, the state has rejected the claim because it concluded that Gray was procedurally barred from obtaining post-conviction review, and this determination is an independent and adequate state law ground for denying Gray relief from his sentence as to this claim.

With respect to this claim Gray's situation cannot be distinguished from that of the petitioner in Coleman v. Thompson, 501 U.S. 722 (1991) and that case therefore governs the disposition of this claim. Coleman had filed a petition for state habeas review that raised several federal constitutional claims that he had not raised in his unsuccessful direct appeal. 501 U.S. at 727. The lower state court held an evidentiary hearing and denied Coleman relief. Id. Coleman filed a notice of appeal of the denial of his state habeas relief that was three days late under the state rule. Id. The Virginia Supreme Court granted the state's motion to dismiss. Id. at 727-28. Once the United States Supreme Court denied him certiorari, Coleman sought federal habeas review. Id. at 728. He raised a total of eleven claims, four that he had raised on direct appeal to the Virginia Supreme Court and seven that he raised

consider it any further.

⁶ To this ground Gray adds in this 28 U.S.C. § 2254 petition that his attorney also failed to notify him of the status of his appeals until after they were denied and that his attorney failed to file a direct appeal of his conviction. I address these in section C below.

for the first time in his state habeas. Id. The District Court ruled that Coleman had procedurally defaulted the seven new claims and the Fourth Circuit Court of Appeals affirmed. Id.

The majority of the Supreme Court concurred, concluding that the dismissal rested on “independent and adequate state grounds” and was not subject to federal habeas review. It reasoned that the “independent and adequate state ground doctrine” “applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds.” Id. at 729-30.⁷ Gray’s ineffective assistance of counsel claim for failing to identify and bring to the parties’ attention the mistaken attribution of driving record falls solidly beneath the Coleman gauntlet.

a. No relief from procedural default because of cause and prejudice or a fundamental miscarriage of justice

In Coleman the Court explained the limited avenue for relief from a procedural default of federal habeas claims in the state courts:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged

⁷ The Court reflected on how the concerns behind this doctrine relate to the concerns animating the exhaustion doctrine:

Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer “available” to him. See 28 U.S.C. § 2254(b); Engle v. Isaac, 456 U.S. 107, 125-126, n. 28 (1982). In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States’ interest in correcting their own mistakes is respected in all federal habeas cases.

Id. at 731-32.

violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

501 U.S. at 750. The Court further stressed the federal courts must not “undervalue[] the importance of state procedural rules,” id. at 750, by relieving defaulted state habeas procedure of their default as long as they did not deliberately by-pass state procedures and, thus, state review. Id. at 744-45. Relief from these defaults must only be provided if the petitioner meets the cause and prejudice standard, a hands-off-standard that recognizes “the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.” Id. at 750.

Gray, proceeding pro se, had not expressly attempted to meet the cause and prejudice standard or assert in what way, if at all, there has been a fundamental miscarriage of justice. However, Gray’s argument that he was essentially denied his right to seek relief through the state post-conviction process because he did not have an attorney to assist him in meeting the deadlines is a conceivable argument that there was cause for his failure to comply with the state’s statute of limitation. Gray also seems to place some of the blame for his statute of limitation troubles on his attorney who represented him in his Rule 35 motion and appeal but did not keep him abreast of the status of the appeals prior to their determination.

Whether this is framed as an ineffective assistance claim or a denial of counsel claim it cannot form the predicate for relief from his procedural default. It is true that a properly exhausted ineffective assistance of counsel claim can suffice to establish “cause” for a procedural default. Murray v. Carrier, 477 U.S. 478, 488 (1986). However, ineffective counsel can only constitute cause if it is an

independent constitutional violation. Coleman, 501 U.S. at 752-57. Gray had no constitutional right to counsel in his state collateral proceedings, id. at 755, so ineffectiveness of counsel cannot serve to establish “cause” sufficient to salvage Gray’s federal habeas claims from their procedural default in the Maine courts. See also 28 U.S.C. § 2254(i) (barring 28 U.S.C. § 2254 relief premised on ineffective assistance during state or federal collateral post-conviction proceedings). Though in a perfect world justice might be served by providing defendants with legal counsel until the completion of the state and federal habeas review, the Constitution does not require this and the argument that this is a “fundamental miscarriage of justice” cannot be sustained.⁸

2. The Material Mistake of Fact/Due Process Claim

a. Exhaustion and adequate presentation of the federal question to the Maine courts

Gray’s claim that he was denied due process because of the material mistake of fact is not quite so readily dispatched. As stated above Gray’s rebuffed proffer to the Maine Law Court in his appeal of the unfavorable Rule 35 motion exhausted his “due process” claim for purposes of obtaining federal habeas review. I revisit the exhaustion inquiry because the State stridently argues that Gray did not exhaust this claim and defaulted it for purposes of state and federal collateral review. The State concedes that Gray gave the state courts a glimpse of this claim in his Rule 35 motion and in his brief on appeal to the Maine Law Court of that unfavorable determination. However it argues that Gray failed

⁸ Gray’s ardent efforts in seeking state and federal post-conviction relief evidence his perception that there has been a serious miscarriage of justice in his sentence. However, without belaboring the point, the legal standard, “fundamental miscarriage of justice” is one that requires a much higher showing than Gray can come near making. As the discussion directly below demonstrates, the principal defect of which Gray complains was not an independent constitutional defect and the sentencing court’s reconsideration and, in a sense, reimposition of the same sentence after the driving record confusion was brought to his attention entirely deflates any argument that justice was miscarried.

to adequately alert the state courts to the constitutional nature of his claim. Thus, the State argues, this claim was procedurally defaulted

because more than a year has elapsed since Gray's sentencing and the State court cannot entertain a new Rule 35 motion in order to address this claim because it is barred from doing so by Maine Rule of Criminal Procedure 35(c)(1). Furthermore, the State asserts, in order to get post-conviction relief from the state courts, the Maine post-conviction statute, like 28 U.S.C. § 2254, provides that a petitioner waives his right to post-conviction relief if he fails to raise the error on direct appeal. See 15 M.R.S.A. § 2128(1).

It is true that Gray's due process argument in his memorandum to the Maine Law Court was simplistic. In seven paragraphs he describes the procedural history of his case and the mistake vis-à-vis the records made by the sentencing judge. (Mem. Def. Appeal at 1-2.) He then states:

8. The defendant's sentence was clearly influenced by a mistake of fact made by the Sentencing Justice as contemplated by Rule 35 of the Maine Rules of Criminal Procedure.
9. The defendant should be resentenced to ensure the defendant's sentence is strictly in compliance with the standards under **State v. Hewey**; as the Defendant argues that the aggravating factors are not as represented by the Sentencing Justice and the Defendant's right to the due process law [sic] can only be protected by a resentencing and having a sentence meted out in this case that is actually in compliance with the Hewey case's analysis. In the Sentencing Justice's Order denying the Defendant's Motion he admitted that this error had occurred.
10. Lumping the defendant in a vehicular manslaughter with more recent and multiple driving offenses that are clearly not his and sentencing him on that is a serious error that can only be redressed through a resentencing or a straight reduction in the sentence handed down.
11. Resentencing will cause no prejudice to the State and will only work to ensure that the Defendant is accorded the full due process of the law to which he is entitled.

(Id. at 2.)

While the constitutional argument may be facile it is not one that is hidden amidst sundry other claims, unconnected to supporting facts, or obtuse and in need of spelling out, which is the kind of mischief that the First Circuit cases relied upon by the State seek to root out. For instance, in Adelson v. DiPaola, 131 F.3d 259 (1st Cir. 1997) the First Circuit identified the petitioner's constitutional claim in his federal habeas as being "that the state trial judge's preemption of the jurisdictional issue and his concomitant refusal to instruct the jury on it relieved the prosecution of its due-process-imposed burden to prove all the substantive elements of the charged crimes." 131 F.3d at 262. The Adelson panel concluded that there was inadequate presentation of this claim to the state courts because the petitioner "neither premised these arguments on federal constitutional grounds nor provided any signposts that pointed toward a due process pathway to reversal of his conviction. The petitioner cited no federal cases, made no mention of the Fourteenth Amendment, and eschewed all references to the concept of due process." Id. at 263. See also Martens v. Shannon, 836 F.2d 715, 717-18 (1st Cir. 1988) (concluding that there was an inadequate articulation of the constitutional claims of ineffective assistance of counsel and denial of due process because of the lack of evidentiary hearing, the petitioner's best argument being that he made "a passing reference or two" in his state court filings "to the fact (a) that he was unrepresented by counsel for a long spell, and (b) that no evidence was taken on his dismissal motions"). This claim might have been unadorned with extensive argument, but it was "presented-face up and squarely" and the federal question was "plainly" defined, within two senses of that word. Id. at 717.

Gray's argument before the Law Court that the material mistake of fact denied him due process "pointed towards the due process pathway." The fact that Gray cites to state and not federal decisional

law does not deflect Gray from this course. After a lengthy exposition of the presentation doctrine, the Nadworny v. Fair, 872 F.2d 1093 (1st Cir. 1989) panel concluded that the petitioner had “met the bare minimum required to create ‘a constitutional frame of reference’” for his sufficiency of the evidence and failure to instruct on a lesser included offense challenges even though he cited only state law decisions in support of his constitutional claims. 872 F.2d at 1097-98, 1102. Gray cited State v. Hewey, 622 A.2d 1151 (Me. 1993) as authority for his right to have an accurate presentation and consideration of aggravating factors at his sentencing. Hewey clearly is a state law decision directed at instilling regularity in the sentencing process and aiding appellate review. Id. at 1154-55. The principals of this case are not articulated as protecting constitutional interests. However, Gray spelled out in a separate paragraph that he was making a due process claim, a claim that the State concedes is readily apparent under Townsend v. Burke, 324 U.S. 736 (1948). While oblique references to “due process” may not always be sufficient to trigger exhaustion, Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987), under the facts of this case Gray squeaks over the presentation hurdle.

So, I conclude Gray had exhausted his first ground at the time he presented his first petition to this court because he had already aired it to the State’s highest court. Therefore, as I now consider this ground as having been stayed while Gray attempted further exhaustion, I must proceed to consider the merits of Gray’s material mistake of fact/due process claim.

b. The merits of the material mistake of fact/ due process claim

This brings us to the standard by which I review this claim:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a [s]tate court shall not be granted with respect to any claim that was adjudicated on the merits in [s]tate court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.

28 U.S.C. § 2254(d).

The State concedes that Gray has a “clearly established” constitutional right to have a sentence imposed based on factually accurate information. As cited by the State, the Supreme Court annunciated this due-process-based constitutional requirement in Townsend, 324 U.S.736. In Townsend the sentencing judge identified as convictions three charges on which the petitioner was found not guilty. Id. at 740. In counter-distinction to Gray’s hearing, Townsend had no attorney representing him at the sentencing proceeding. The Court reversed the sentence, identifying due process infirmities. It observed:

It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law.

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.

Id. at 741.⁹ See also United States v. Tucker, 404 U.S. 443 (1972) (following Townsend in a case

⁹ The simplicity of the Townsend holding and the ease with which the State concedes that Gray has a “clearly established” constitutional right to have a sentence imposed based on factually accurate information further undermines the State’s contention that Gray did not adequately alert the state courts to the constitutional nature of

where sentence was premised on two constitutionally invalid convictions).

It is uncontested that all the parties to Gray's sentencing proceeding failed to catch the driving record mix-up at the time of sentencing. Thus, at this stage, Gray, though not technically "uncounseled" as was Townsend, experienced a similar sort of unchecked "carelessness" during sentencing. Gray's sentencing proceeding was marred by "assumptions concerning his criminal record which were materially untrue." Townsend, 334 U.S. at 741. However, it does not follow inexorably that Gray's sentence is "inconsistent with due process of law." Id.

In this case Gray's attorney took the right steps after identifying the error and Gray, as a result, got the corrective process that was his due. The superior court revisited its order and made the determination that even if he did not attribute the three operating under suspension convictions to Gray it "would not alter the sentence imposed by the court given the significant facts of the tragic accident caused by the defendant tested at .24 BAC after the accident. Additionally, the medical records revealed a long history of substance abuse, coupled with a significant criminal history in the mid-1970s." (Order Apr. 7, 2000.) Therefore, unlike the record considered in Townsend, this court is "at liberty to assume" that the three misattributed infractions "did not influence the sentence which [Gray] is now serving." Townsend, 334 U.S. at 740. Add to this the fact that the Maine Law Court's denial of a certificate of probable cause expressly states that it considered the proceedings in the superior court and the memoranda submitted to it and concluded that the appeal did "not raise any issue worthy of being fully heard." (Order Denying Cert. of Probable Cause.) In short, as envisioned by Townsend, Gray

his claim.

had his opportunity to correct the errors, assisted by counsel he invoked the Rule 35 process, and the Maine court undertook that review.

For these reasons I simply cannot conclude that Gray meets the highly deferential 28 U.S.C. § 2254 standard for federal habeas relief on his material mistake of fact/due process claim. The superior court's reconsideration and the Law Court's denial of probable cause were not contrary to nor did they involve an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). Nor, in light of the reconsideration given Gray by the sentencing court can it be said that the state court proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." *Id.* at § 2254(d)(2).

C. Gray's Remaining Claims Raised for the First Time in This Federal Habeas Petition

Regarding Gray's third 28 U.S.C. § 2254 ground, briefly touched on above, he states, "As I have no representation by counsel and have been unable to retain an attorney, I can not submit the proper paperwork within the time frames I was given to utilize the appeals process effectively. I feel that this, in effect, denies my right of appeal." This claim arises out of Gray's frustrated efforts to exhaust his state remedies and to get his habeas petition in front of this court. As a consequence, it could not have been presented to the state courts in a direct appeal or in the post-conviction petition.

It appears that this claim may conceivably fall within the embrace of 28 U.S.C. § 2254(b)(1)(B). That subsection provides that federal habeas relief may be available for claims not presented to the courts of the state if "there is an absence of available [s]tate corrective process; or [] circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(B)(i),(ii). However, I need not decide the point. Subsection (2) of § 2254(b) provides:

“An application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the [s]tate.” 28 U.S.C. § 2254(b)(2). And this is the course I choose for this and Gray’s two unexhausted fragmentary ineffective assistance claims.

I understand Gray’s frustration with the difficulty of navigating the state and federal filing deadlines as a pro se litigant. However, Gray simply does not have a constitutional right to have an attorney assist him with pursuit of post-conviction relief. Title 28 U.S.C. § 2254 expressly provides that “ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.” 28 U.S.C. § 2254(i). And, as already noted in subsection B(1)(a) supra, the United States Supreme Court has so stated in addressing a claim that the petitioner’s attorney ineffectiveness was responsible for the late filing of his state habeas and, thus, his procedural default of his federal claims. Coleman, 501 U.S. at 752-53.

Gray’s claim, attached to his second ground, that his attorney did not keep him abreast of the status of his appeals until they were denied does not state a claim for ineffective assistance of counsel. It should be denied despite the lack of exhaustion. First, it is worth noting that Gray’s attorney would unlikely have any information on the status of Gray’s appeal until decision was rendered. Second, and more importantly, Gray’s ability or inability to get a status report on the progress of his appeal before a court’s decision was entered could not impact the outcome of his case. To sustain an ineffective assistance of counsel claim Gray must demonstrate that, but for counsel’s deficient performance, the

outcome of his proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 692-93 (1984).

Finally, in his second ground Gray asserts that his attorney failed to file a direct appeal of his conviction. Once more, I recommend denial of this claim even though there is no suggestion that Gray exhausted this claim in the state courts. Gray was convicted after he pleaded guilty. Consequently, absent some effort by Gray to challenge the plea process, there was no basis in law for Gray to appeal his conviction. Gray, assisted by his attorney, properly pursued a motion to correct or modify his sentence, which was the road-worthy vehicle with which to bring the material mistake of fact claim and to seek redress for any error made by the sentencing judge. An appeal of his conviction based on the mistake of fact made by the sentencing judge in the absence of the Rule 35 motion would have been frivolous. His attorney strategically pursued the only possible avenue of relief available.

Conclusion

For these reasons I recommend that the Court **DENY** Gray 28 U.S.C. § 2254 relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

September 28, 2001.

Margaret J. Kravchuk
United States Magistrate Judge

ADMIN

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-102

GRAY v. ROWE

Filed: 05/30/01

Assigned to: Judge GEORGE Z. SINGAL

Demand: \$0,000

Nature of Suit: 530

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

JOHN WESLEY GRAY

JOHN WESLEY GRAY

plaintiff

[COR LD NTC] [PRO SE]

CHARLESTON CORRECTIONAL FACILITY

1202 Dover Rd, Charleston, ME 04422

v.

STEVEN ROWE

DONALD W. MACOMBER, ESQ.

defendant

[COR LD NTC]

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